No. 96-1428

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

ANHEUSER-BUSCH, INC. and PENN ADVERTISING OF BALTIMORE, INC.,
Petitioners,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE CITY; KURT L. SCHMOKE, in his official capacity as Mayor of Baltimore City; CITY COUNCIL OF BALTIMORE CITY; and DAVID TANNER, in his official capacity as the General Superintendent of Zoning Administration and Enforcement,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

INTRODUCTION

Civil rights are meaningless unless they can be enforced. The decision of the Fourth Circuit majority profoundly threatens all commercial speech rights because it renders powerless the sole enforcer of those rights, the judicial branch. Based on its view of separation of powers, the Fourth Circuit majority held that government's asserted justification for content-based censorship may not be subjected to "judicial review under a clearly erroneous standard or otherwise." App., *infra*, 26a. That holding conflicts directly with this Court's commercial speech decisions, which require the judiciary to hold government to

a substantial burden of proof. This petition should be granted because, as Baltimore cannot deny in its opposition brief, the Fourth Circuit majority's decision leaves commercial speakers with nowhere to turn for meaningful protection of their First Amendment rights.

In another conflict with this Court's decisions, the Fourth Circuit majority also posited that the First Amendment applies with less rigor when government claims to be restricting speech in order to protect children. Baltimore chose to address this "special solicitude" issue only obliquely in its brief. Nonetheless, the petition should also be granted to clarify that this Court's decisions in the indecency area do not require a reduction of First Amendment scrutiny in the commercial speech context when the government asserts a goal of child protection.

REPLY TO RESPONDENTS' ARGUMENTS

I. BALTIMORE DOES NOT DISPUTE THAT THE FOURTH CIRCUIT'S DECISION, IF LEFT STANDING, WILL RESULT IN THE ROUTINE DISMISSAL OF COMMERCIAL SPEECH CHALLENGES AT THE PLEADING STAGE

Baltimore does not dispute that the decision of the Fourth Circuit majority provides a road map to any government that wants to impose content-based restrictions on commercial speech without fear of judicial invalidation. The legislature need only craft a self-serving preamble to its speech restriction, reciting its belief that the restriction will directly and materially advance its asserted goal. The speech restriction would then be insulated from a First Amendment challenge because, in the majority's view, legislative conclusions that purportedly satisfy the *Central Hudson* test cannot be "trumped by the fact finding apparatus of a single court." App., *infra,* 26a. If this were the law, the judicial branch would have no role in protecting commercial speech rights, as the courts would be obliged to accept as true the legislative branch's purported justification for its censorship. The proverbial fox,

in the form of majoritarian legislative bodies, would be guarding the First Amendment chicken coop.

The Fourth Circuit majority's virtual elimination of the judicial branch from its role as guardian of the First Amendment conflicts directly with this Court's decisions. This Court's commercial speech decisions are a product of meaningful judicial review of the evidentiary record proffered by a government to satisfy the *Central Hudson* test and by the challenger to refute the government's showing. *See, e.g., 44 Liquormart, Inc. v. Rhode Island,* 116 S. Ct. 1495 (1996); *Florida Bar v. Went For It, Inc.,* 115 S. Ct. 2371 (1995); *United States v. Edge Broadcasting Co.,* 509 U.S. 418 (1993); *Edenfield v. Fane,* 507 U.S. 761 (1993); *City of Cincinnati v. Discovery Network, Inc.,* 507 U.S. 410 (1993). On a more fundamental level, this Court has emphasized the critical role of the judicial branch in reviewing speech restrictions that, like the Ordinance, are content-based, because of the danger that the national discourse will be distorted by majoritarian suppression of disfavored or less popular ideas. *See Police Dep't of Chicago v. Mosley,* 408 U.S. 92, 95-96 (1972); *United States v. Associated Press,* 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd,* 326 U.S. 1 (1945); *see also Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 771 (1976).

Rather than acknowledge this conflict, Baltimore mouths the Fourth Circuit majority's claim that it somehow made an "independent assessment" of the factual issues raised by the *Central Hudson* test. Brief in Opp. at 6-7 (*quoting* App., *infra,* 4a); *see* App., *infra,* 3a n.*. It is not possible, however, that the majority made such an "independent assessment" because these cases were terminated on Rule 12(b)(6) motions, with no opportunity for petitioners to contest in court the Baltimore City Council's legislative "findings" or submit contrary evidence. The majority's acceptance of Baltimore's self-serving preamble to the Ordinance as irrebuttable fact belies its claim that it made

the "independent assessment" required by this Court's decisions.[1]

Clearly, the majority's decision directly conflicts with this Court's decisions with respect to the role of the judicial branch in protecting commercial speech rights. This overarching conflict in constitutional theory permeates the three more practical, subsidiary conflicts with this Court's decisions, discussed below, concerning how the courts should apply the *Central Hudson* test.

A. The Dismissal under Rule 12(b)(6)

The Fourth Circuit majority's dismissal of petitioners' well-pleaded complaints under Rule 12(b)(6) conflicts with this Court's repeated statements that the government, not the challenger, bears the burden of proof under *Central Hudson*. *See, e.g., Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1592 (1995). Baltimore does not contest that the majority's approach will result in the routine dismissal of commercial speech challenges on the pleadings without any opportunity for the challengers to test the

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[1] The inadequacy of the Fourth Circuit majority's "assessment" is illuminated by contrasting it with this Court's recent decision in *Turner Broadcasting System, Inc. v. F.C.C.*, 1997 WL 141375 (Mar. 31, 1997) (*Turner II*), a case involving a content-neutral restriction on speech, which Baltimore's restriction on alcohol beverage advertising most assuredly is not. *See id.* at *25 (Stevens, J., concurring) (noting that if the must-carry rules "regulated the content of speech rather than the structure of the market, our task would be quite different."). The must-carry rules at issue were first considered by the Court in *Turner Broadcasting System, Inc. v. F.C.C.*, 114 S. Ct. 2445 (1994). There, the Court remanded the case to the district court for a "more substantial elaboration" of the "predictive or historic evidence" upon which the government relied to justify its restriction. *Id.* at 2471. On remand, the district court conducted 18 months of additional proceedings during which it considered extensive evidence proffered by the parties, including "expert submissions, sworn declarations and testimony, and industry documents." *Turner II*, 1997 WL 141375 at *5. Only after the district court had reviewed that "expanded record" did this Court conclude that judicial findings could be made under the level of scrutiny appropriate to a content-neutral restriction on speech. *Id.* at *9.

government's "proof" or submit contrary evidence. Instead, Baltimore attempts to defend the majority's Rule 12(b)(6) approach, but succeeds only in underscoring its conflict with this Court's decisions, including *Florida Bar*.

Baltimore mistakenly contends that the majority's Rule 12(b)(6) dismissal is "no different from" this Court's decision in *Florida Bar*: "In *Florida Bar*, as in this case, once the reviewing court satisfied itself that the legislative record contained empirical support demonstrating the restraint would directly advance the government's purpose, the judicial inquiry under *Central Hudson*'s third prong was over." Brief in Opp. at 11. To the contrary, this Court in *Florida Bar*, after considering the legislative record, took the additional step of "scouring the record" made in court for contrary evidentiary submissions from the plaintiffs—but found none. 115 S. Ct. at 2378; *see* Petition at 15-16 (quoting relevant language from *Florida Bar*). In stark contrast, the Fourth Circuit majority's decision to proceed under Rule 12(b)(6) precluded petitioners from making any evidentiary submissions in defense of their speech rights.[2]

The Fourth Circuit majority's Rule 12(b)(6) approach conflicts with this Court's First Amendment jurisprudence (*see Discovery Network*, 507 U.S. 410, 418-19), the Federal Rules of Evidence (*see Daubert v. Merrell Dow*

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[2] As another theory for blocking the development of a contested evidentiary record, Baltimore suggests in its Questions Presented (but never elaborates in its brief) that the courts must judicially notice legislative findings that purportedly justify a restriction on commercial speech as "legislative facts." *See* App., *infra*, 26a. Petitioners submit that the factual inquiries raised by *Central Hudson*'s third and fourth prongs are properly characterized not as "legislative facts," but as "adjudicative facts," which are the "ultimate facts in the case, plus those evidential facts that are sufficiently central to the controversy that they should be left to the [trier of fact] unless clearly indisputable." 21 Charles A. Wright & Kenneth W. Graham, *Federal Practice & Procedure* § 5103 at 478 (1977 & Supp. 1995); *see* Fed. R. Evid. 201(a) advisory committee's note.

Pharmaceuticals, Inc., 509 U.S. 579, 589 (1993)), and Rule 12(b)(6) itself, which requires that the allegations in a well-pleaded complaint must be accepted as true on a motion to dismiss (*see Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)). Petitioners respectfully urge the Court to review the majority's decision because, left untouched, it would encourage other courts to cut off First Amendment challenges regardless of what is alleged in a complaint and without any testing of the government's "proof."

B. The Third Prong: Direct and Material Advancement

Baltimore also does not dispute that a conflict exists between the Fourth Circuit majority's decision and this Court's recent decisions concerning the third prong of *Central Hudson*. This Court requires a government to demonstrate "in fact" that its restriction on speech "directly and materially" advances its asserted purpose. *Rubin*, 115 S. Ct. at 1592. Government cannot satisfy that burden based solely on the superficial "reasonableness" of its beliefs. *44 Liquormart*, 116 S. Ct. at 1511 (Stevens, J.); *id.* at 1522 (O'Connor, J.). In conflict with this Court's holdings, the Fourth Circuit majority required Baltimore to show only that it "reasonably" believed that a "logical nexus" exists between its restriction and its asserted purpose. App., *infra*, 29a, 31a. Instead of addressing that conflict, Baltimore argues the merits of these cases, and in so doing, reinforces the importance of granting this petition to clarify the duty of the judiciary under the third prong.

In a premature effort to show this Court that it satisfied the third prong, Baltimore offers the same lengthy recitation of the legislative history of its Ordinance that was relied on by the majority. Brief in Opp. at 9-10. But that legislative history, and particularly what is missing from it, further underscores the majority's misunderstanding of its duty under *Central Hudson*. Nowhere in that history is there any evidence of how the Ordinance, with its myriad exemptions, in fact will affect the exposure of Baltimore's

minors to outdoor advertising for alcohol beverages.[3] Nor is there any evidence concerning the extent to which Baltimore's minors will continue to be exposed to alcohol beverages in every other advertising medium and in the social settings of contemporary life. Because the majority did not have before it any evidence on these issues, its decision cannot possibly be harmonized with this Court's decisions that require the judiciary to hold the government to a "demonstration in fact" standard of proof under the third prong. *See Rubin*, 115 S. Ct. at 1592.

In a further attempt to deny the conflict created by the Fourth Circuit majority's decision, Baltimore claims that the majority was permitted to use "common sense" to find that the government had satisfied the third prong. Brief in Opp. at 8, 11-12. But it is certainly not "common sense" that reducing minors' exposure to some outdoor advertising for alcohol beverages, while leaving untouched all other alcohol beverage advertising—including advertising on government-owned MTA buses and in Baltimore's stadiums—and social influences, will directly and materially reduce illegal underage consumption. *See 44 Liquormart*, 116 S. Ct. at 1509 (Stevens, J). Further, even if such an attenuated cause-and-effect relationship made sense intuitively to the two judges in the majority, their process conflicted with this Court's established practice of allowing challengers of First Amendment restrictions to submit evidence that might belie "common sense" assumptions. *See* Petition at 15. In short, the majority's "reasonable belief" approach to the third prong cannot be

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[3] Resolution of the third prong inquiry requires evidence on the effects of not only the exemptions contained in the Ordinance itself, but also the later enacted exemption for signs on the exterior surfaces of the more than 1,500 retail establishments located throughout Baltimore's neighborhoods. JA108. In its brief, Baltimore mistakenly asks this Court to disregard that exemption on the grounds it was not mentioned in the complaints or considered by the courts below. Brief in Opp. at 1. In fact, the exemption, which was not passed until after the complaints were filed, was the subject of extensive argument in petitioners' briefs to the Fourth Circuit both before and after this Court's remand.

reconciled with this Court's *Edenfield* standard, and that conflict alone merits the granting of the petition.

C. The Fourth Prong: No More Extensive Than Necessary

Baltimore does not dispute that this Court requires judicial scrutiny under the fourth prong of "obvious less-burdensome alternatives to the restriction on commercial speech." *Discovery Network*, 507 U.S. at 417 n.13; *see 44 Liquormart*, 116 S. Ct. at 1510 (Stevens, J.); *id.* at 1519-20 (Thomas, J.); *id.* at 1521-22 (O'Connor, J.); *Florida Bar*, 115 S. Ct. at 2380; *Rubin*, 115 S. Ct. at 1593-94. Nor does Baltimore claim that the Fourth Circuit majority engaged in such scrutiny. *See* App., *infra*, 35a. Instead, Baltimore makes the "strawman" argument that the availability of non-speech-restrictive alternatives, although concededly relevant under the fourth prong, is not always dispositive. Brief in Opp. at 13-14. But the issue on this petition is not whether the availability of such alternatives ultimately will prove to be dispositive in these cases. Rather, the issue is whether a court can refuse to require government to make any showing as to why it did not adopt obvious non-speech-restrictive alternatives, and deny plaintiffs any opportunity to contest the government's showing, particularly where the court itself recognizes that the alternatives "might indeed prove beneficial" in advancing the government's purpose. *See* App., *infra*, 34a.

In its response, Baltimore improperly conflates two distinct speech issues by suggesting that its failure to adopt less burdensome alternatives is "not constitutionally significant" because its restriction leaves open alternative channels of communication between alcohol beverage marketers and adult consumers. Brief in Opp. at 13, 16. Baltimore claims that this argument is supported by Justice O'Connor's opinions in *Florida Bar* and *44 Liquormart*, but those opinions contain no suggestion that government can avoid its obligation to consider non-speech-restrictive alternatives simply by limiting its speech restriction to one medium. If Baltimore were correct, then govern-

ment could censor commercial speech one medium at a time without any regard for the fourth prong of *Central Hudson*.

This petition should be granted to clarify the burden on government under the fourth prong. Petitioners submit that courts must do more than blindly accept unsubstantiated claims, such as those made by Baltimore, that government had no choice but to censor speech because obvious, non-speech-restrictive alternatives have "proven ineffective." *See* Brief in Opp. at 15. The Fourth Circuit majority's radical rewriting of the fourth prong to eliminate enforcement of the government's burden of proof is of vital importance to all commercial speakers and their audiences.

II. BALTIMORE MAKES NO ATTEMPT TO ADDRESS THE CONFLICT WITH THIS COURT'S DECISIONS CREATED BY THE FOURTH CIRCUIT'S RULE OF "SPECIAL SOLICITUDE" FOR A RESTRICTION ON SPEECH THAT IS PASSED FOR THE ASSERTED PURPOSE OF PROTECTING CHILDREN

Tellingly, Baltimore offers no real response to petitioners' argument that this Court also should resolve the conflict created by the Fourth Circuit majority's conclusion that a speech restriction must receive "special solicitude" from the courts if the legislature claims to have passed it for the purpose of protecting children. App., *infra*, 8a. That conclusion conflicts directly with this Court's decisions, which invariably hold that a legislature's asserted interest in protecting children cannot diminish judicial scrutiny of a speech restriction that affects communication between adults. *See Sable Comms. of Calif., Inc. v. F.C.C.*, 492 U.S. 115 (1989); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983); *Butler v. Michigan*, 352 U.S. 380 (1957).

This Court should grant the petition to clarify whether its decisions in the indecency area stand for the proposition, assumed by the Fourth Circuit majority, that a new category of speech protection has emerged, a category

that depends not on the content of the speech, but on the nature of government's asserted goal. In the majority's view, government need only assert that its goal is the protection of children, and its restriction on speech will receive diminished First Amendment scrutiny. By granting this petition, the Court will provide critical guidance to the many courts and legislatures that are, or soon will be, considering the conditions under which speech may be restricted for the ostensible purpose of protecting children.

CONCLUSION

The petition for a writ of certiorari should be granted and full briefing ordered. Alternatively, the judgment below should be summarily reversed and these cases should be remanded with instructions to permit discovery and a subsequent evidentiary hearing on the merits.

Respectfully submitted,

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